

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs Hongmae Jeong

CASE NUMBER: 1730729

HOME AFFAIRS REFERENCE(S): BCC2015/1540088

MEMBER: Russell Matheson

DATE: 13 March 2020

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211(2) of Schedule 2 to the Regulations; and
- cl.820.221(1)(a) of Schedule 2 to the Regulations.

Statement made on 13 March 2020 at 10:23am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – parties validly married – substantial corroborative evidence provided – genuine and continuing relationship – truthful and credible witness – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5, 65

Migration Regulations 1994 (Cth), r 1.15, Schedule 2, cls 820.211, 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant is a 43-year-old female national of Korea. She applied for the visa on 27 May 2015 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied the applicant was the spouse of the sponsor. The applicant seeks review of the delegate's decision.
4. The applicant appeared before the Tribunal on 10 March 2020 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal also notes that two witnesses attended the hearing and were not required to give evidence. The Tribunal was informed the witness had provided statutory declarations attesting to the genuineness of the parties' relationship and had no other information to provide at the hearing. The Tribunal hearing was conducted with the assistance of an interpreter in the Korean and English languages.
5. The applicant was represented in relation to the review by her registered migration agent.
6. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
8. The Tribunal has before it the applicant's file from the Department of Immigration (the Department); its own file; and a copy of the Department's decision provided by the applicant to the Tribunal.
9. The evidence the parties provided at the Tribunal hearing is recorded throughout this decision record.

Hearing

10. The applicant and sponsor provided information and numerous documents to the Department with the visa application. Additionally, the parties provided at the hearing to the Tribunal information and documents that include:
 - Statutory declarations from the applicant and sponsor;
 - Joint bank account statements;
 - Transaction history statements for money transfers to the applicant's daughter;

- Last will and testament;
- Tenancy agreement/rent ledger/receipts;
- Correspondence from real estate agent;
- Form 888 statements;
- Various photographs;
- Evidence of travel;
- Church reference/letter of support;
- Receipts for household purchases;
- Correspondence from CBA addressed to the applicant and sponsor individually;
- Car insurance/registration;
- Utility bills;
- Applicant's and sponsor's passports;
- Tenancy agreement;
- Bupa health insurance receipts/tax invoice/health insurance statements; and
- Marriage certificate.

Whether the parties are in a spouse or de facto relationship

11. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian permanent resident.
12. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

13. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act. The applicant provided a copy of the

marriage certificate registered under the *Marriage Act 1961* indicating the applicant and sponsor were married at Rhodes, NSW, on 12 April 2015. There is no evidence before the Tribunal to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

14. In forming an opinion as to whether they are in a marital relationship and in considering whether they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, whether their relationship is genuine and continuing, and whether they live together and not separately and apart on a permanent basis as defined in s.5F(2)(b)-(d), the Tribunal has had regard to all the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship, the nature of the applicant's and the sponsor's household and their commitment to each other as set out in r.1.15A(3).
15. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below, the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
16. The Tribunal had the benefit of the applicant's and the sponsor's oral evidence at the hearing and found their evidence to be detailed, consistent and overall, credible. The Tribunal gave all the evidence provided by the parties at the Tribunal hearing and evidence provided by the applicant to the Department and the Tribunal file due regard. The applicant provided a significant amount of additional documentary and photographic evidence to the Tribunal.
17. The Tribunal acknowledges the delegate's concerns set out in the primary decision record. The Tribunal discussed these with the applicant and the sponsor in the course of the hearing and the Tribunal is satisfied that the parties were credible witnesses.

Are the other requirements for a spouse relationship met?

Financial aspects

18. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, especially in relation to major financial commitments, whether any person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of daily household expenses.
19. The parties gave evidence and provided statements of operating a joint account with Commonwealth Bank Australia (CBA). They further stated that the joint account is utilised for their daily living expenses and payment of bills and direct debits such as the rent, internet, car insurance/registration, Bupa health insurance, Vodafone bills, Opal card and e-toll. The applicant produced her debit card #7229 linked to the joint account, the sponsor was unable to produce his debit card at the hearing. The parties also provided evidence of a savings account with the CBA linked to the joint account. The parties gave evidence that the sponsor is the sole income earner. The sponsor gave evidence of sending money transfers to the applicant's daughter in Korea and produced transaction history statements for the period February 2016 to February 2020 at the hearing. The parties said the money transfers were utilised for the daughter's daily living expenses and education.

20. The parties had a sound knowledge and presented detailed and consistent evidence of their financial affairs, including individual income, bank accounts, daily living expenses, rental payments, payment of utility bills, household purchases, future financial plans and commitments.
21. The parties gave detailed and consistent evidence in relation to the financial aspects of the relationship. The parties' evidence is that they have no joint liabilities and no major assets such as property together. There is limited evidence before the Tribunal of pooling or sharing of financial resources or any ongoing financial obligations. There is no evidence before the Tribunal that one person in the relationship owes any legal obligation in respect of the other. The Tribunal accepts that the parties are prepared to share their financial resources and any ongoing or future financial responsibilities.
22. The Tribunal places some positive weight on this aspect of the relationship.

Nature of the household

23. The Tribunal has considered the nature of the household, including any joint responsibility for the care and support of children, the living arrangements and daily routine of the parties, and the sharing of the responsibility for housework, to form an opinion as to whether the parties are living together and not living separately and apart on a permanent basis.
24. The parties stated that from the time of committing to their relationship they have shared the responsibility of the housework. The applicant stated that she did the cleaning, washing, cooking, shopping and organised the payment of the household bills. The sponsor stated that he did all the maintenance around the home. The parties gave evidence that they are currently renting and living in a unit at Lidcombe. They provided detailed and consistent evidence of their personal history, living arrangements, household responsibilities, household purchases, daily routine, employment and work hours. The parties provided a significant amount of documents and correspondence addressed to them individually and jointly at their current and previous address in Lidcombe confirming joint cohabiting. The Tribunal found the parties' oral evidence and the documentary evidence persuasive.
25. The parties gave evidence of their previous relationships. The applicant stated that she has a daughter living in Korea with her mother and the sponsor supports her financially. She further stated that the money sent to her daughter is used for her daily expenses and education.
26. The Tribunal accepts that the parties live together and they have established a joint household and share the responsibility of the housework and joint responsibility for the care and support of the applicant's child from a previous relationship.

Social aspects

27. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinions of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
28. The parties gave evidence that they are devoted Christians and attend church every Sunday and attend regional group meetings with other Christians. They further stated they go on monthly fishing trips with friends and regularly attend the local gym together and have dinner parties and dine out with family and friends. They provided evidence that they are socially recognised as husband and wife and engage frequently with family, friends and work colleagues presenting themselves in a committed spousal relationship. The applicant

provided a significant amount of additional documentary and photographic evidence of their social activities. The applicant provided photos of herself and the sponsor with each other, and with friends and family members in a number of social settings and church gatherings.

29. The Tribunal accepts that the relationship is socially recognised by family and friends and they represent themselves to other people as being married to each other. The Tribunal accepts that the parties plan and undertake joint social activities together. There are limited statements from third parties who express their view that the relationship is a genuine one. The Tribunal places some positive weight on the social aspects of the relationship.

Commitment

30. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length of time the parties have lived together, the degree of companionship and emotional support they provide each other and whether the parties view the relationship as a long-term one.
31. The parties claim to have first met at church in March 2014 and entered into a committed relationship in November 2014 and were married in April 2015. The applicant provided a copy of the couple's marriage certificate. The Tribunal accepts the parties are lawfully married. To date, the parties have been in a relationship for a period of time exceeding five years.
32. The parties provided documentary evidence of their last will and testament listing each other as beneficiaries. They also spoke of their future financial plans and purchasing their own property together. They also said that they want to reunite with the applicant's daughter by having her relocate to Australia so they can live together as a family unit. The sponsor stated that he has pledged his love for the applicant and is committed to the care and support of the applicant's daughter. The applicant gave evidence that the sponsor is a loving and caring person who supported her emotionally and physically during difficult times such as her marriage breakdown. The applicant gave evidence that she has provided care and support to the sponsor after back surgery. The parties provided strong evidence of supporting each other in sickness and health and expressed their love of each other. The parties expressed their view that they have another opportunity in life after failed marriages to be happy and they have planned their long-term future together.
33. The Tribunal is satisfied that the parties see their relationship as stable, mutually supportive and a long-term one. The Tribunal considers their evidence with regard to their commitment to each other plausible, persuasive and genuine.
34. The Tribunal notes that the applicant and the sponsor were able to articulate the reasons for their decision to form a relationship and spoke of their common interests, expectations and future plans.
35. The Tribunal is satisfied the parties provide each other with a strong degree of companionship and emotional support that is commensurate with a couple having a commitment to a shared life together. The Tribunal is satisfied the couple view their relationship as a long-term one.

Findings

36. The Tribunal is satisfied, having had regard to the totality of the circumstances and the evidence provided at the hearing, that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied they live together and not

separately and apart on a permanent basis. Having considered all the evidence and the circumstances of the relationship as detailed above, the Tribunal is satisfied the parties were in a spousal relationship at the time of application.

37. The Tribunal is satisfied that the sponsor is not prohibited from being a sponsoring partner and continues to sponsor the applicant. The Tribunal is satisfied that the sponsor, at the time of the visa application and decision, was an Australian citizen who had turned 18.
38. The applicant's movement records provide evidence of her having been the holder of a Higher Education (Subclass TU573) visa at the time of application that was valid until 30 August 2016. She held this substantive visa upon applying for the Partner (Temporary) (Class UK) Subclass 820 visa on 27 May 2015. As the applicant held a substantive visa at the time of application, further requirements in cl.820.211(2)(d) need not be met.
39. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2)(b)-(d) of the Act were met at the time the visa application was made and are met at the time of this decision.
40. Therefore the applicant meets cl.820.211(2) and cl.820.221(1)(a).
41. Given the findings above, the appropriate course is to remit the visa application to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

42. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl.820.211(2) of Schedule 2 to the Regulations; and
 - cl.820.221(1)(a) of Schedule 2 to the Regulations.

Russell Matheson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).